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In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the constitutional principles of dual sovereignty reflected in the Tenth Amendment.

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STATEMENT

1. Procedural History.

In this action, the State of South Carolina and its Attorney General challenged the constitutionality of the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721 - 2725 (1994 & Supp. III 1997). The DPPA had been enacted in 1994 by the 103rd Congress, but its effective date was postponed for three years, until September 1997. Pub. L. No. 103-322, Tit. XXX, § 300003, 108 Stat. at 2102.

The district court held that the Act violated the Tenth Amendment, and enjoined its application shortly before it was scheduled to take effect in September 1997. Pet. App. 38a-56a, 72a. The district court further held that the DPPA could not be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Pet. App. 56a-72a. The court of appeals affirmed on both grounds. Pet. App. 1a-26a.[1] The United States petitioned for certiorari, and on May 17, 1999, the writ was granted.

In its Reply Memorandum at the certiorari stage of this case, the Government explicitly abandoned its Fourteenth Amendment argument, stating that it "does not rely in this Court on Section 5 of the Fourteenth

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[1] The four circuits in which the issue has arisen are evenly split. In the present case and *Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999), petition for cert. pending, No. 99-61, the DPPA was held unconstitutional. The opposite result was reached in *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), petition for cert. pending, No. 98-1818 and in *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998), petition for cert. pending, No. 98-1760.

Amendment as a basis for the DPPA, and the certiorari petition does not seek review of the court of appeals' decision rejecting the Fourteenth Amendment as a basis for the DPPA." Reply Memorandum for the Petitioners at 2.

2. State Licensing of Drivers and Motor Vehicles.

The first automobiles had scarcely begun to sputter down the nation's unpaved roads when it was recognized that public safety required the registration and licensing of motor vehicles. Likewise, it was immediately recognized that the new vehicles could and would be used for interstate travel.[2]

Even though the interstate nature of automobile travel was apparent from the outset, the States undertook the task of registering motor vehicles at an early date, following a brief initial flurry of municipal or county registration ordinances.[3] New York's 1901 statute was the first statewide motor vehicle registration act. 1901 N.Y. Laws 1313, 1315. By 1906, over 30 of the then-45 States, including South Carolina, had enacted legislation requiring

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[2] For instance, as early as 1901, entrepreneurs had installed six recharging stations for electric automobiles in New Jersey along the route from New York City to Philadelphia, making a three-state trip a realistic possibility. J. Flink, *America Adopts the Automobile, 1895-1910*, at 240 (1970).

[3] *Id.* at 166-169.

the statewide registration of motor vehicles.[4] Interstate reciprocity was an early feature of the various States' legislation. Vehicles registered in one State were permitted to travel through other States without the need for additional registration. *See, e.g., United Transp. Co. v. Hass*, 91 Misc. 311, 155 N.Y.S. 110 (1915).

Despite the States' rapid assumption of the responsibility for developing reciprocal automobile registration systems, some automotive interests were soon lobbying for federal control of motor vehicles. Thus by 1905 the American Automobile Association and the National Association of Automobile Manufacturers had begun to request Congress to enact a national motor vehicle registration law.[5] Several bills to that effect were introduced in the 59th Congress, and this early effort eventually reached its zenith in 1910, but Congress ultimately chose to leave the matter under the control of the States.[6]

3. Public Availability of Information in Motor Vehicle and Drivers' License Records.

In 1994, when the DPPA was enacted, the sponsors asserted that state law in approximately two-thirds of the States (34 States) treated motor vehicle records as open to

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[4] U.S. Department of Transportation, Federal Highway Administration, *Highway Statistics, Summary to 1975*, at 43 (1975).

[5] Flink, *supra*, 172-73.

[6] *Id.*

the public. 140 Cong. Rec. H2522 (daily ed. April 20, 1994)(statement of Rep. Moran). Another estimate was that the States were nearly evenly split in their respective approaches to public accessibility to these records. *See* Dorothy L. Glancy, *Privacy and Intelligent Transportation Technology*, 11 Santa Clara Computer and High Tech. L.J. 151, tbl. c (1995)(listing 27 States as providing public access to motor vehicle records). Whatever the exact tally prior to 1994 might be, it is apparent that substantial numbers of States by 1994 had made different policy choices about the desirability of making driver and motor vehicle records freely accessible to the public. As will be shown below, South Carolina is an example of a State which has taken a middle ground, allowing its records to be open to some extent, but only if the person making the request discloses his or her own identity.

4. The Driver's Privacy Protection Act.

The DPPA consists of a command by Congress to the States not to disclose specified information in driver's license and motor vehicle records, followed by at least fourteen exceptions. The general rule against disclosure, if a rule so exception-ridden can be said to be general at all, is found in 18 U.S.C.§ 2721(a). The exceptions are set forth in 18 U.S.C. § 2721(b)(1) through –(b)(14). Section 2721(a) provides:

> (a) IN GENERAL—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

The administration of the statute is made complicated by the number and nature of the many exceptions. Some of the exceptions involve use of the records in the operation of governments and businesses. *See, e.g.*, 18 U.S.C. § 2721(b)(1), –(b)(2), –(b)(4) (permissible to release records to government agencies exercising law enforcement and other functions); 18 U.S.C. § 2721(b)(3) (permissible to release records to "a legitimate business," but only for certain purposes). Other exceptions which 18 U.S.C. § 2721(b) permits to the general rule of nondisclosure include disclosure to insurers, disclosure to towing services, disclosure to licensed private investigators or security services, and disclosure in connection with commercial drivers and toll transportation facilities. 18 U.S.C. § 2721(b)(6), –(b)(7), –(b)(8), –(b)(9) and –(b)(10). Disclosure by consent of an individual is permitted by 18 U.S.C. § 2721(b)(13). In 18 U.S.C. § 2721(b)(11), Congress authorizes unlimited individual disclosures of the records by the States, so long as the States have first provided motor vehicle owners a clear and conspicuous way to prohibit such disclosures. Even when the States have received permission from owners to make unlimited *individual* disclosures under 18 U.S.C. § 2721(b)(11), however, the States still may not make *bulk* disclosures of motor vehicle information unless the States first provide individuals "an opportunity, in a clear and conspicuous manner, to prohibit such uses," i.e., uses involving bulk disclosures. 18 U.S.C. § 2721(b)(12)(A). The last of the fourteen exceptions permits disclosure "for any other use

specifically authorized under the law of the State that holds the record," but only if "such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14). The court in *Pryor v. Reno* concluded after reciting this list of exceptions that "Congress riddled the Act with more holes than Swiss cheese." 171 F.3d at 1284.

This complex Congressional directive to the States would require considerable effort to administer in practice. An employee or official of a Department of Motor Vehicles (DMV) would need to review each specific request in order to make a judgment whether the requested disclosure is mandated by the Act, prohibited by the Act, or permitted (in whole or in part) by one of the many exceptions. A state official would thus need to make judgment calls about the statute's application.[7] That state official would be the person who would be seen as granting or denying the request and who could bear the blame for any errors.

The state official could receive more than simply blame for erroneous decisions about whether to disclose or withhold information. The Act creates potentially severe federal penalties for erroneous decisions by state officials. A state DMV employee or official could be charged with "knowingly violat[ing] this chapter," a federal crime, and fined if found guilty. 18 U.S.C. § 2723(a). In addition, 18 U.S.C. § 2724 exposes state officials and employees to the full plethora of federal civil remedies if such persons can be

[7] The Eleventh Circuit has pointed out that the Act "contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information." *Pryor*, 171 F.3d at 1286.

proven to have knowingly disclosed personal information from a motor vehicle record for a purpose not permitted under the Act. These remedies include actual damages of a minimum of $2,500, punitive damages if the disclosure is willfully or recklessly made, attorneys' fees, and equitable relief.[8]

The Act also contains several provisions which require the States to disclose personal information from DMV databases for certain purposes. 18 U.S.C. §2721(b). The Eleventh Circuit in *Pryor*, 171 F.3d at 1283, concluded that this part of the Act "requires" the States to make disclosures under the listed circumstances.[9]

5. South Carolina Law.

South Carolina's response to the problem of potential misuse of the information in DMV databases has been to enact legislation which requires a person requesting such information to sign a form which lists the requestor's name

[8] The impact of the Act on South Carolina was undisputed below. In South Carolina seventy field offices have full access to the federally-proscribed records. Jt. App. 16. Considerable training of numerous persons would therefore be required in order for the State to try to avoid unintentional erroneous disclosures by its officials and employees. Jt. App. 16. Even then, inconsistent results could be expected since each determination would be made on an ad hoc basis. Many or most other States probably have the same widespread access to records by field offices.

[9] The Attorney General of California has concluded that the Act requires disclosures of matters which under California law had previously not been subject to disclosure. 79 Op. Cal. Att'y. Gen. 76 (1996).

and the reason for the request. *S.C. Code Ann.* § 56-3-510 (Cum. Supp. 1999). These forms are kept for five years. Any person whose motor vehicle information is disclosed may examine the form signed by the person who requested to see the information. *S.C. Code Ann.* § 56-3-520 (Cum. Supp. 1999).[10] These statutes were enacted in 1996; the courts of South Carolina have not yet had occasion to decide whether they prohibit the bulk sale of information in the DMV databases.

In addition, unlike the Federal Constitution, the Constitution of South Carolina contains an express guarantee of the right of privacy:

> The right of the people to be secure in their persons, houses, papers, and effects against . . . unreasonable invasions of privacy shall not be violated . . . .

S.C. CONST. Art. I, §10. This provision was specifically intended to protect against the dissemination of computer database information held by state government. The drafters of this provision commented as follows:

> . . . the Committee recommends that the citizen be given constitutional protection from an unreasonable invasion of privacy by the State. This additional statement is designed

[10] South Carolina law also makes stalking a criminal offense, *S.C. Code Ann.* §§ 16-3-1700, *et seq.*, and increases the penalty if DMV records were used by the stalker. *S.C. Code Ann.* §§ 16-3-1710(C), 16-3-1720(C).

> to protect the citizen from improper use of electronic devices, computer data banks, etc. Since it is almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement on policy, leaving details to be regulated by law and court decisions.

Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 15 (1969). Similar provisions exist in the constitutions of a number of other States. *See, e.g.*, CAL CONST. Art. I, § 1; ARIZ. CONST. Art. 2, § 8; FLA. CONST., Art. I, § 23.

A series of events which culminated in the first half of 1999 led to additional changes in South Carolina law. A temporary provision which had been enacted in South Carolina in 1997 and 1998 permitted the bulk sale of drivers' license information, including digitized photographs, for the prevention of fraud. S.C. Act No. 155 of 1997, Part I, § 34.15; Act No. 419 of 1998, Part I, § 36.12. Such bulk sales for fraud prevention would not have been prohibited by the DPPA even if the DPPA had been in effect in South Carolina, because that Act permits disclosures for fraud prevention. 18 U.S.C. § 2721(b)(3). Relying on the temporary provisions cited above, the state Department of Public Safety contracted with a private company for the sale of this information.

The sale of the drivers' photograph database in South Carolina and in two other States eventually became the subject of considerable publicity. *See, e.g.*, O'Harrow,

Posing a Privacy Problem? Driver's-License Photos Used in Anti-Fraud Database, Washington Post, Jan. 22, 1999 at A01. The Attorney General of South Carolina, one of the Respondents in this case, challenged the release of this database in state court, citing the above-quoted state constitutional provision protecting the right to privacy. *Condon v. Image Data, LLC*, No. 99-CP-40-0290 (Richland Co., S.C., Court of Common Pleas). Preliminary injunctive relief was denied in February 1999, but the need for injunctive relief was soon thereafter mooted by two developments. First, the Governor of South Carolina terminated the contract of sale in March 1999. Subsequently, the General Assembly of South Carolina declined to renew the temporary legislative authorization for such sales. In addition, the General Assembly addressed the most prominent privacy concerns exposed by this controversy by enacting permanent legislation which prohibited the sale by the State, or the use by anyone else, of the digitized photographs, Social Security numbers, height, weight, race or signature, when such information is obtained from drivers' license records. S.C. Act No. 33 of 1999; S.C. Act No. 100 of 1999, Part II, §§ 53, 54. Finally, a committee of the South Carolina House of Representatives has begun to make comprehensive review of state privacy laws as a result of these incidents.

SUMMARY OF ARGUMENT

The DPPA thrusts upon the States all of the day-to-day responsibility for administering its complex provisions. It therefore plainly violates the Tenth Amendment and dual sovereignty principles set forth in *New York v. United States*, 505 U.S. 144 (1992), and in *Printz v. United States*,

521 U.S. 898 (1997), by compelling the States to administer a federal regulatory program. There is no question that the DPPA creates a federal regulatory program and forces the States to administer it. As in *New York* and *Printz*, Congress has issued an unconstitutional command to the States which would make state officials the unwilling implementors of federal policy.

Since the DPPA seeks only to direct the functioning of the States' executives, it is unnecessary to analyze the Act as if it involved the incidental application to the States of laws of general applicability. The DPPA is not such a law of general applicability in any event.

Various other contentions made by the Government, including references to federal preemption doctrine, incremental regulation, and the Commerce Clause are also unavailing because of the DPPA's forced use of the States' executives to administer Congress's policy choices. Whatever might be the merits of the policies embodied in the DPPA, they cannot justify a command by Congress to the States to administer the DPPA.

The Government has abandoned its argument made below that the DPPA is a proper exercise of Congress's power to enforce the Fourteenth Amendment. Arguments to that effect by the amici are therefore not properly before the Court, and are without merit in any event.

ARGUMENT

I. THE DRIVER'S PRIVACY PROTECTION ACT VIOLATES THE PRINCIPLE OF DUAL SOVEREIGNTY.

A. The Tenth Amendment Prohibits Congress From Compelling States To Administer Federal Regulatory Programs.

In *Printz v. United States*, 521 U.S. 898 (1997), this Court reiterated its holding in *New York v. United States*, 505 U.S. 144 (1992) that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." 521 U.S. at 933. Stated differently,

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program.

Id. at 935. *Printz* contains numerous other references to the Tenth Amendment's prohibition of federal statutes that require States to administer federal programs. 521 U.S. at 908 n.2., 915 n. 8, 923 n.12, 926, 928, 929.

By commanding the executives of the States to administer Congress's regulatory policy choices as to the release of information in state DMV records, the DPPA violates both the letter and the spirit of the holdings in *New York* and *Printz*. An affirmance of the unconstitutionality of

the DPPA requires only the straightforward application to this case of the Tenth Amendment principles set forth in *New York* and *Printz*.[11]

B. The DPPA Requires The States To Administer A Federal Regulatory Program.

The inquiry into whether a federal statute requires States to administer a federal regulatory program is not a difficult one in this case. It can hardly be denied that the DPPA would establish a federal regulatory program. The Government itself describes the Act as one which is "a regulatory act of the federal government." Pet. Br. 36.

It is likewise indisputable that the day-to-day administration of that regulatory program would be accomplished by the States. Indeed, the federal government's role in administering or even enforcing the Act is virtually nonexistent as a practical matter.

A typical administrative application of the DPPA would occur when a person requests information from a state DMV about a person in the DMV database. The state DMV official would first need to determine whether the

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[11] It is perhaps worth noting that the DPPA, like the Brady Act involved in *Printz*, was enacted by the 103rd Congress several years before *Printz* was decided. The three-year delay in the DPPA's effective date accounts for the various States' challenges to the DPPA not reaching this Court until now. In other words, the DPPA was not drafted with *Printz* in mind, because this Court's decision in *Printz* was still several years in the future when the DPPA was enacted.

request seeks "personal information" as defined by the DPPA. If so, the state DMV official would then need to ascertain whether the request falls within one of the mandatory disclosure provisions of the DPPA, 18 U.S.C. § 2721(b). If disclosure is not mandated but instead appears to be prohibited by the general rule of nondisclosure, the state DMV official would then be required to determine whether the request falls within one of the DPPA's many permissive exceptions to the general rule. The DPPA provides no guidance for determining how credible a claim of exemption must be. If the requestor cannot manage to fit the request within one or more of the Act's fourteen or more exemptions, the DPPA would require the state DMV official to refuse the request. The nature of this laborious process, which would be repeated countless times daily across the nation, leaves no doubt that State DMV officials are the ones upon whom Congress has thrust the duty of administering the DPPA's commands.[12]

Under the DPPA, a state official would thus stand between the requestor and the requested information, just as under the Brady Act a state or local official would stand between a prospective handgun buyer and the purchase of the gun. The DPPA would make state officials the gatekeepers for state information, not because the *States* have decided the information is private, but because *Congress* has so decided. As in *Printz*, "it will be the [state official] and not some federal official who stands between [the requestor and his or her request]. And it will likely be

[12] The record in *Oklahoma v. United States, supra*, indicated that that State processed approximately one million requests for motor vehicle information every year. 161 F.3d at 1268.

the [state official], not some federal official, who will be blamed for any error . . . ." 521 U.S. at 930.

The Government does not expressly deny that the DPPA requires the States to administer a federal regulatory program. This failure of the Government to address this aspect of *New York* and *Printz* does not appear to be inadvertent. Instead it is a reflection of the fundamental and fatal inconsistency between the Government's arguments in this case and the holdings of those cases. Respondents reiterate what the Government cannot bring itself to deny: the DPPA does indeed require the States to administer a federal regulatory program. The practical reality of the matter is that the DPPA commands the States to maintain a broad and ongoing administrative effort, all directed only toward implementing the policy choices of Congress.

C. By Blurring Political Accountability, The DPPA Violates Dual Sovereignty Principles.

By requiring the States to administer a federal regulatory program, the DPPA violates the rule expressed in the literal language of *New York* and *Printz*. *See Printz*, 521 U.S. at 935 (federal government may not "command the States' officers . . . to administer or enforce a federal regulatory program"). In so doing, it permits Congress to regulate vicariously, using the States as the front line administrators of the program, and also permits confusion in the public eye as to the source of the regulation. Denial by state officials of access to government records will always look like state government action for the simple reason that it is, in fact, state government action; statutes such as the

DPPA permit confusion about which government is acting. Such blurring of political accountability cannot occur when, for instance, the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710, is applied by a private person such as a video store owner, whom no one would mistake for a government official.

The structure of federalism in this country was specifically designed to avoid the kind of involuntary transfer of political accountability from the Federal Government to the States that the DPPA seeks to accomplish. As *New York* holds, "[i]n the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States . . . ." 505 U.S. at 165. The result of this structural arrangement was to avoid diminution of accountability for both state and federal officials. *Id.* at 168-69. Otherwise Congress could govern, as it has sought to do here, as one sovereign hiding behind the other, governing by proxy and by stealth. If this Court were to approve any form of Congressional ability to exercise power in this sleight-of-hand fashion, Congress might soon find this method of governing irresistible.

One aspect of the blurring of accountability which is caused by a statute such as the DPPA is that "[m]embers of Congress can take credit for 'solving' problems" without requiring the federal government to incur the financial or other burdens of administering the statute. *Printz*, 521 U.S. at 930. One need only read the comments of some of the DPPA's sponsors and advocates to see that this is exactly what happened when the DPPA was enacted. *See generally* 139 Cong. Rec. 29,466-29,470 (1993). A great deal of

federal credit was taken for what would prove to be an enormous state effort. Most federal involvement ended with the Act's passage, while the States were saddled with the daily burden of administering the Act into the indefinite future.

In addition to pointing to the absence of political accountability in a system where the federal government could command the States to regulate, *Printz* also identified several other reasons underlying its holding. The Court first conducted a review of the history of federal-state relations and found that history to be "[b]ereft of a single early, or indeed even pre-20th-century, statute compelling state executive officers to administer federal laws. . . ." 521 U.S. at 908 n.2. Such an avoidance by Congress of this "highly attractive power," 521 U.S. at 905, provided "reason to believe that the power was thought not to exist." *Id.* The nonexistence of the power was also held to follow from statements of the Framers, as set forth in detail in *New York*, 505 U.S. at 161-66.

The division of power between the state and federal governments, *Printz* reaffirms, is "one of the Constitution's structural protections of liberty." 521 U.S. at 921. By dividing and balancing power between state and federal governments, this separation of powers "reduce[s] the risk of tyranny and abuse from either front." *Id.*, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The federal government's share of constitutional power, *Printz* holds, would be "augmented immeasurably if it were to impress into its service–and at no cost to itself–the police officers of the 50 States." 521 U.S. at 922. The same augmentation of power would occur if the federal government could

accomplish its goals through the use of the DMV employees of the 50 States.

In contrast to the coerced use of States as federal agents, there are many federal statutes which encourage States to adopt federal policy, either through attaching conditions to the receipt of federal funds or through allowing the States to regulate activity under federal standards as an alternative to federal preemption of the entire regulatory effort. *See New York*, 505 U.S. at 166-69. Statutes of both kinds have become so commonplace that perhaps it was easy for Congress to overlook the radical nature of a statute which crosses the line from encouragement to coercion. But if Congress were able to conscript state governments into its service with no more basis than a Commerce Clause nexus, the nature of federalism would be altered beyond recognition. If this Court were to offer any suggestion that Congress possesses this "highly attractive power" to regulate vicariously, *Printz*, 521 U.S. at 905, it could be expected that Congress would have little difficulty finding other ways to put the States' executives to work.

D. Other Standards Asserted By The Government Are Not Found In This Court's Jurisprudence And Are Not Implicated By The DPPA.

The Government asserts that the DPPA does not violate dual sovereignty because it does not "require state governments or officers [either] to regulate the primary activities of private parties or to participate in the enforcement of federal law against private actors." Pet. Br.

27.[13] It is questionable whether this formulation accurately summarizes this Court's precedent, but even if it does, the operation of the DPPA possesses both of these characteristics.

The contention that the DPPA does not require States to regulate "primary conduct," Pet. Br. 18, 33, is simply incorrect. Regulation can occur through negative commands as well as through those which impose positive duties. Thus, for example, the prohibition of access to information is as much a regulation of conduct as the prohibition of access to a physical location. Under the Government's suggested concept of what constitutes regulation, a person who builds a fence with a locked gate around a tract of land would not be regulating access to that tract.

Moreover, this concept of the States' role being one of merely passive decliners of requests to view records is not truly accurate. In most cases, of course, a denial of access by a state DMV official would end the matter, but if, for example, someone were to attempt to use force in order to view the requested records on a DMV computer screen, it can hardly be imagined that state officials would sit by passively and allow the records to be examined. State officials would need to take affirmative steps to prevent this intrusion, and indeed could be committing a federal crime themselves if they did not take such steps. Even if this

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[13] By stating that only one of these attributes need be present, the Government tacitly concedes the holding of *Printz* that a statute can violate dual sovereignty even if it imposes no enforcement duties on the States.

example is unlikely, its very unlikeliness is proof that the prohibitions of the DPPA derive most of their strength from the governmental power of the States rather than from that of the federal government.

New York, moreover, explicitly recognized that Congress cannot impose duties on the States regardless of whether the duties imposed are mandatory or prohibitory in nature. As the Court summarized its historical review in that case:

> We have always understood that even where Congress has the authority . . . to pass laws *requiring or prohibiting* certain acts, it lacks the power directly to compel the States to *require or prohibit* those acts.

505 U.S. at 166 (emphasis added). Thus, even if the role of the States were nothing more than to prohibit access to their DMV records, this would constitute regulation of primary conduct under both the language of *New York* and under normal concepts of the nature of regulation.

The Government also claims that the DPPA is valid because it does not require the States to "participate in the enforcement of federal law against private actors." Pet. Br. 27. It is unclear exactly what is meant by this phrase. When *Printz* speaks of state participation, it speaks only of participation in the administration or implementation of the federal regulatory scheme, rather than participation in its enforcement. 521 U.S. at 904, 917-18, 934. As already discussed, the DPPA unquestionably forces the States to

participate in the administration and implementation of its provisions.

If, on the other hand, the Government means to suggest that a federal statute is unconstitutional only if it requires States directly to enforce the federal law against private parties, such an argument departs from the holding of *Printz*, which concluded that Congress may not require the States "to administer *or* enforce a federal regulatory program." 521 U.S. at 935 (emphasis added). The Court's use of the disjunctive reflects that the Brady Act required no direct enforcement activities by state officials. Instead, that statute required only that local law enforcement officials make a check, usually a computer check, to determine whether a proposed gun sale would be lawful. 521 U.S. at 903. The local law enforcement officer was not even required by the Brady Act to prevent sales determined to be unlawful. *Id.* Since enforcement of the gun control provisions of the Brady Act remained with federal authorities, the Court characterized the role of local law enforcement officials as one "in the *administration* of a federally enacted regulatory scheme." *Id.* at 904 (emphasis added). Clearly, as *Printz* indicates, a Tenth Amendment violation can occur without regard to whether direct enforcement is made a duty of state officials. In any event, as already shown, it is possible that state officials might need to take affirmative enforcement steps if someone forcefully sought access to the records in some fashion.

If the need for state enforcement efforts, as opposed to state administrative efforts, would be rare, the need for federal enforcement efforts would be rarer still. In contrast to the daily administrative efforts which the DPPA requires

of the States, any federal enforcement activity under the Act would occur only under extraordinary circumstances. The Act's principal enforcement mechanism for the wrongful disclosure of information does not require activity by the federal government at all. The Act instead creates a private civil action for damages by the person to whom the information pertains. 18 U.S.C. § 2724. Federal activities are limited primarily to criminal enforcement where there is willful disclosure or obtaining of information, or the obtaining of information by making false representations. 18 U.S.C. §§ 2722, 2723(a). Federal actions against the States for civil penalties of $5,000 per day are also authorized, but only in cases where the State has a policy or practice of substantial noncompliance. Federal enforcement activities are thus likely to be reserved for rare and unusual cases, which means that the amount of federal effort needed to implement the DPPA pales beside the ongoing daily administrative efforts which the Act requires of the States. The DPPA places the States on the front lines, allowing the federal presence to rest so far behind the lines as to be invisible.

II. BECAUSE OF THE MANNER IN WHICH THE DPPA UNCONSTITUTIONALLY ENCROACHES ON DUAL SOVEREIGNTY, A "BALANCING" ANALYSIS IS UNNECESSARY.

Printz holds that where the challenged statute involves "the forced participation of the States' executive in the actual administration of a federal program," 521 U.S. at 918, there is no need to consider "whether the incidental

application to the States of a federal law of general applicability excessively interfered with the functioning of state governments." *Id.* at 932. The Court declined to engage in the balancing analysis of earlier Tenth Amendment cases such as *South Carolina v. Baker*, 485 U.S. 505 (1988), concluding instead that since "the whole *object* of the law [was] to direct the functioning of the state executive," such balancing was "inappropriate." *Id.* (emphasis in original).

As in *Printz*, there is no doubt in this case that "the whole object" of 18 U.S.C. § 2721(a) is "to direct the functioning of the state executive." That section covers no one but state officials, and directs them not to disclose information in state records. Like the Brady Act, the DPPA requires state officials to act, or refrain from acting, only in their official capacities, with regard only to official records. And as in *Printz*, "the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible." *Id.* at 932 n.17.

Once Congress seeks to direct the functioning of the state executive, *Printz* holds, the statute "compromise[s] the structural framework of dual sovereignty." 521 U.S. at 932. This renders the balancing analysis of cases such as *Baker* inappropriate, because

> [i]t is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

Id. (emphasis in original). The DPPA possesses the same "fundamental defect."[14]

III. THE DPPA IS NOT A LAW OF GENERAL APPLICABILITY WHICH INCIDENTALLY APPLIES TO THE STATES.

There is no question that 18 U.S.C. § 2721 applies only to records held by the States. Nevertheless, the Government devotes over half of its argument (Pet Br. 32-48) to an attempt to analyze this statute as if it were one of general applicability, in turn inviting this Court to reach the balancing analysis which *Printz* concluded it was unnecessary to reach. For the reasons set forth in Question II above, the Court need not address these arguments, but even if addressed they are unavailing.

This Court has held that the Tenth Amendment is not necessarily violated when "Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 161. *See also Printz*, 521 U.S. at 932

[14] The Government also asserts that the DPPA should be upheld because it does not impair the sovereign functions of the States. Pet. Br. 32-33 & n.14. This argument is nothing more than another invocation of the balancing test which has no application once Congress has commandeered the States' executive to administer a law which applies only to the States. In *College Savings Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.*, 119 S.Ct. 2219, 2226-2231(1999), this Court rejected a similar argument by the United States that the constitutional privileges of the States should turn on whether a State voluntarily participates in activities which are arguably removed from core state functions.

("incidental application to the States of a federal law of general applicability").

The Government asserts that there is no "rigid constitutional rule" requiring that Congress only subject state governments to generally applicable laws. Pet. Br. 37. However, the only cases cited by the Government are those in which the statutes were indeed laws of general applicability, and were later characterized by this Court as such. *New York*, 505 U.S. at 161; *Printz*, 521 U.S. at 932. The Government can cite no case which upholds a law applying solely to States and compelling them to administer a federal regulatory program. To the contrary, general applicability is a characteristic of every statute upheld against Tenth Amendment challenge in the cases cited by the Government at Pet. Br. 34-38. This was true not only in such cases as *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Fair Labor Standards Act) and *EEOC v. Wyoming*, 460 U.S. 226 (1983)(Age Discrimination in Employment Act), but also in *South Carolina v. Baker*, *supra*. In *Baker*, the statute at issue was aimed at "tax evasion concerns *posed generally* by unregistered bonds . . . ." 485 U.S. at 510 (emphasis added). As a result, "it cover[ed] not only state bonds but also bonds issued by the United States and private corporations." *Id.*[15] The remaining cases cited by the Government likewise involved the incidental application to the States of generally

[15] Since *Baker* involved a statute which applied also to private persons and to the federal government, the Court's approval of that statute as one which in that context "regulate[d] state activities," 485 U.S. at 514, was simply another reference to the incidental application of a general law to the States.

applicable statutes. *See Maryland v. Wirtz*, 392 U.S. 183 (1968)(Fair Labor Standards Act); *Fry v. United States*, 421 U.S. 542 (1975)(Economic Stabilization Act of 1970); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982)(Railway Labor Act).

Contrary to this Court's own characterization of these cases, the Government argues that they should instead be viewed as cases where the statutes "did not commandeer or conscript state governments in their own regulatory role." Pet. Br. 36. It bears repeating that this is not an accurate statement of the holding in *Printz*, which was that the States could not be forced to "administer or enforce a federal regulatory program." 521 U.S. at 935. Nevertheless, the Government essentially restates its argument that a federal statute will not be voided unless it requires state governments to "regulate private conduct." Pet. Br. 30. Since the DPPA does conscript state governments to regulate, this argument by the Government is no more availing in this guise than it was earlier.

When the States are subjected to statutes which apply generally, such statutes apply so broadly that they are unlikely to be mistaken for governmental policy choices by the States. The blurring of political accountability is greatly lessened in such instances. In addition, the characteristic of general applicability is a built-in protection against the possibility that the States will be singled out as entities to effectuate federal policy. This Court has recognized in a First Amendment tax case, for example, that when a protected interest is singled out for special legislative treatment, "the political constraints that prevent a legislature from passing crippling taxes of general applicability are

weakened, and the threat of burdensome taxes becomes acute." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983). In the same way, when only the States are subjected to a Congressional enactment, the political constraints against excesses in the statute are likewise weakened.[16]

IV. ADDITIONAL ARGUMENTS MADE BY THE GOVERNMENT ARE INAPPOSITE.

Beginning at Pet. Br. 34, the Government makes several other arguments for sustaining the statute's constitutionality. For the reasons set forth below, none of these arguments apply to the statute at issue in this case.

A. The DPPA Cannot Be Sustained As A Valid Exercise Of Commerce Clause Power Or Of Federal Preemption.

The Government's brief is permeated with references to the Commerce Clause power of Congress. There is probably little question that Congress has the power under the Commerce Clause to prevent the dissemination by

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[16] This rationale for permitting laws of general applicability to apply to States is developed more fully in the amicus brief of the State of Alabama, et al. The Government, quoting the 7th Circuit in *Travis*, *supra*, parodies the rationale of "general applicability" cases as one in which a statute is validated only if it achieves "Brobdignagian" size. Pet. Br. 42. It is simply a truism that the broader the application of a proposed statute, the less likely its chances of adversely affecting a single class.

private persons of personal information in databases. Nevertheless, as this Court held in *New York*,

> even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. [Citations omitted] The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate State governments' regulation of interstate commerce.

505 U.S. at 166. Accordingly, the Government's argument is not advanced by references to the Commerce Clause power of Congress when such power is exercised in a manner which overrides the dual sovereignty protections of the Tenth Amendment.

The Government also suggests that if this Court concludes that the DPPA is unconstitutional, such a holding would be "difficult to square with this Court's preemption jurisprudence." Pet. Br. 38. The DPPA, however, bears no resemblance to a federal statute preempting state regulation of interstate commerce. A federal statute preempting state legislation is one which displaces all state action, rather than compelling specific state actions. Where federal law properly preempts state law, there is no room for doubt that the federal government is responsible for all regulatory activity. Wherever preemption occurs, the States are simply shut out of the process.

As indicated in the Statement (p. 3, *supra*), the possibility that Congress might assume control over the registration of automobiles and drivers has been asserted since the earliest days of motoring. Congress, however, has always chosen to leave these duties to the States, even after broader Commerce Clause powers came to be recognized later in the century. This Court has recognized that Congressional directives to the States which fall short of full preemption are "more troublesome" than a simple federal assumption of control over the particular field. *FERC v. Mississippi*, 456 U.S. 742, 759 (1982). *See also id.* at 787 (separate opinion of O'Connor, J.). If Congress were to choose to preempt state motor vehicle regulations, the powers of the States would obviously be cut back more severely than in the case of the DPPA, but much more would be required of federal authorities than in the case of the DPPA, where practically no federal activity is involved. The sheer size and cost of a true preemption of state law in this area is a substantial deterrent to any Congressional effort to regulate motor vehicles generally. However, even if federal preemption were to occur, it would carry a benefit for the States which the DPPA does not: if Congress were to regulate registration itself, the resources of the States could be devoted to other matters. *FERC*, 456 U.S. at 787 (separate opinion of O'Connor, J.).

B. The DPPA Cannot Be Sustained As A Valid Instance Of Incremental Regulation.

Equally inapplicable to this case is the concept of incremental regulation, the concept that "reform may take one step at a time." *Williamson v. Lee Optical, Inc.*, 348

U.S. 483 (1955). *See* Pet Br. 39-45. The question once again is not one of *what* Congress may regulate, but instead is one of *how* Congress must regulate. This Court's Tenth Amendment jurisprudence holds that Congress may not use the States as implements of regulation.

It would not necessarily be impossible for Congress to limit the practical ability of persons to access state DMV records. For instance, the DPPA itself contains a suggestion as to how some of Congress's purpose might be furthered without violating the Tenth Amendment. To the extent the DPPA is an effort by Congress to regulate the interstate commercial use of personal information by direct marketers and others, this problem is probably capable of solution by direct federal regulation of the marketers themselves. If 18 U.S.C. § 2722(a), which prohibits the disclosure of DMV information by "any person," had been limited to private individuals, Tenth Amendment problems might have been avoided because Congress would then have regulated private individuals directly.[17] Congress's decision instead to place on the States the burden of regulating access to DMV records simply illustrates again why the DPPA is an impermissible shortcut.

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[17] Neither the courts below nor the parties have addressed the issue of whether 18 U.S.C. § 2722, if read to apply only to private parties, might be upheld to a limited extent. Respondents would suggest that the language of 18 U.S.C. § 2722, which applies to state officials as well as private persons, is nevertheless not severable, because "this Court may impose a limiting construction on a statute only if it is readily susceptible to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997)(internal quotation marks omitted). There is nothing about this section which would support a limiting construction.

The impetus for this legislation nevertheless was not the issue of bulk sales. Instead, the Act's passage was driven by the attempt to address stalking and other crimes. *See, e.g.*, 140 Cong. Rec. H2526-27 (statement of Rep. Goss)(daily ed. April 20, 1994). The antistalking aspect of the DPPA, while certainly well-intentioned, would appear to be another instance of the rejected argument that Congress has the power to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 564 (1995). In other words, even if there were no other way for Congress to address this perceived problem, that difficulty reflects the reality that "Congress has vast power but not all power." *Alden v. Maine*, 119 S.Ct. 2240, 2268 (1999).

V. THE STRUCTURE OF THE DPPA RENDERS IRRELEVANT THE MERITS OF ITS POLICIES.

The Government and its amici suggest throughout their briefs that the policies embodied in the DPPA are worthy ones which effectively would justify a holding that the statute is constitutional. *New York* holds, however, that even if the statute addresses a "pressing national problem, . . . a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." 505 U.S. at 187-188. *Accord*, *Printz*, 521 U.S. at 933 (quoting *New York*'s holding, 505 U.S. at 187, that separation of powers provides a means to "resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day"). This rule applies *a fortiori* in the present case, which involves

legitimate concerns, but none so intractable as the issue of disposal of nuclear waste, nor so pervasive as the sale of handguns to convicted felons and others.

Even if a statute's policy could insulate it from Tenth Amendment scrutiny, the DPPA in any event is a fairly inefficient means for executing its asserted policies. Its numerous exceptions could probably be evaded by any determined stalker, especially since the Act contains no standards for verifying that a request validly falls within one of the exceptions. Its prohibition on bulk sales was so weak that it did not prevent the motor vehicle departments of several States from selling all information in their databases, including digitized photographs and signatures, to a company whose asserted use for the records was the prevention of identity fraud. These sales were apparently permitted disclosures under 18 U.S.C. § 2721(b)(3)(allowing businesses to "verify the accuracy of personal information" submitted by individuals).

The present case is an illustration of how state law can address a problem more completely or effectively than federal law. For instance, South Carolina's statute would appear to be a simpler and more practical deterrent to stalkers. The DPPA attempts to engineer its policies with great precision, but in the process the rule is practically lost in its exceptions. The South Carolina statute simply requires that any individual who requests personal information from the state DMV must also disclose his or her name; it also permits the subject of the request to find out who has requested such information about him or her in the previous five years. §§ 56-3-510, -520, *S.C. Code Ann.* (Cum. Supp. 1999). While no method of deterring stalkers (and least of

all the DPPA) can be completely effective, the South Carolina approach would seem to have a better chance of preventing this crime, since the South Carolina statute strips away the desire for anonymity which lies at the heart of the crime of stalking. Moreover, the amendments to South Carolina law which followed the disclosure that photographs and signatures had been sold provide an example of how state governments can provide a rapid and efficient response to a problem which Congress has only imperfectly addressed.

Even worse than the limited effectiveness of the DPPA is its tendency to stifle more innovative or effective solutions by the States. Just as this kind of statute reduces the political accountability of Congress, it also can have the effect of discouraging initiative on the part of state legislatures. Even as members of Congress can take credit for "solving" a problem, their efforts, however ineffective, can also induce state legislators to conclude that the problem has been solved, or at least solved well enough, so that further innovation in the area ends. *See generally FERC, supra*, 456 U.S. at 788-790 (separate opinion of O'Connor, J.).

VI. THE GOVERNMENT HAS EXPRESSLY ABANDONED ITS CONTENTION THAT THE DPPA IS AN EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

As already noted, the Government expressly abandoned its argument made and rejected below that the

DPPA could be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.[18] U.S. Cert. Reply Mem. 2. That issue nevertheless is raised by all three amici who filed briefs in support of the Government's position.

Respondents submit that this issue should not be considered as a basis for reversal. Rule 14.1 (a) of the Rules of this Court provides in part that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *Dion v. United States*, 476 U.S. 734, 746 (1986). This rule should particularly apply where the Petitioner has expressly disavowed a ground for reversal.

Even if the Court were to reach the issue, however, it is patently without merit. No case decided by this Court holds or suggests that there is a federal constitutional right of privacy in these records.[19] Absent an established federal constitutional right, "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997).

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[18] The Government's Fourteenth Amendment argument was rejected by both circuits which reached it. Pet. App. 22a-26a; *Pryor, supra,* 171 F.3d at 1288 n.10.

[19] The absence of a *federal* constitutional right does not, however, mean that the *States* cannot create such a right of privacy, either through state constitutions or state statutes. As set forth above, South Carolina is among the States in which state law creates rights of privacy.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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